**THE UNDER SECRETARY OF LABOR**
WASHINGTON, D. C.
20210

Case No. 83-ERA-7

In the matter of

Irvin Lee Ashcraft,
Complainant

v.

University of Cincinnati,
Respondent

DECISION AND FINAL ORDER

This is a proceeding arising under section 5851 of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851, and its implementing regulations, 29 CFR Part 24. This section, commonly referred to as a "whistleblower statute," prohibits employers, including licensees of the Nuclear Regulatory Commission (NRC), from discriminating in terms, conditions, or privileges of employment against any of their employees because the employee has engaged in a protected activity.

This proceeding was initiated by an administrative complaint, filed on April 1, 1983, by Irvin Lee Ashcraft, an employee of the University of Cincinnati (University). The complaint alleges that the University, a licensee of NRC, suspended Ashcraft for five days because he engaged in the protected activity of complaining to, and causing an investigation to be started by, NRC concerning



the University's handling of radioactive materials. The University contends that it suspended Ashcraft because of inefficiency and incompetency on the job.

A hearing[1] was held before Administrative Law Judge Daniel J. Roketenetz. On July 1, 1983, Judge Roketenetz issued his Decision and Order (D&O) recommending that the

complaint be dismissed because the University had proven that Ashcraft would have been suspended notwithstanding his protected activity.

Pursuant to 29 CFR 24.6(b), this matter is now before me for decision. After review of the entire record and the memoranda submitted to me by the parties, I adopt the Administrative Law Judge's (ALJ) finding that the respondent University would have suspended the complainant notwithstanding his protected activity. I, therefore, dismiss Ashcraft's complaint.

The events leading to Ashcraft's suspension, span a period of at least three years. Ashcraft has been employed, since 1977, by the University as a Radiation Health Technician in the Radiation Safety Office which is operated under the aegis of the University Medical Center. Ashcraft's responsibility has been to receive all incoming shipments of radioactive materials, to ensure that these materials are not contaminated, and to notify the end users within the University that the materials are available to be picked up.

Sometime in early 1980, Ashcraft began to write letters to various officials of the University complaining about his job, about the inefficient operation of the Radiation Safety Office, and about the private business activities engaged in at the office by his supervisor, Kenneth Fritz. In these letters, Ashcraft also expressed his desire to be considered for a position in some other department of the University. In April 1980, Ashcraft met with Dr. Eugene Saenger, Chairman of the University Radiation Safety Committee, and discussed these matters. Dr. Saenger, in turn, met with supervisor Fritz who complained that Ashcraft was an indifferent worker with poor productivity. In May and November 1980, Ashcraft also wrote similar letters of complaint to the auditor of the State of Ohio, and requested that the Radiation Safety Office be investigated as a " . . . cost item that might not be producing anything." These letters were forwarded by the

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State Examiner to the University.

Ashcraft continued throughout 1981 to write letters to various University officials. On May 12, 1981, he wrote to NRC. In that letter, he complained that supervisor Fritz was incompetent, that Chairman Saenger had conflicts of interest, and that the Radiation Safety Office was mismanaged. Ashcraft also referred to a particular incident of contamination, and pointed out that "[t]here is available a whole list of violations of common sense handling of radiation mishandling incidents." Ashcraft specifically requested that the University's license be withdrawn until there was ". . . satisfactory demonstration of common-sense approach . . . . " to safety; that supervisor Fritz be replaced; and that a new chairman of the Radiation Safety Committee, one without conflicts of interest, be appointed. In his letter, Ashcraft requested anonymity. On August 12, 1981, Ashcraft again contacted NRC. The NRC discussed this second letter with supervisor Fritz.

Meanwhile, Ashcraft's letters to University officials led to animosity between Ashcraft and supervisor Fritz and other University officials, and generated several internal memoranda and actions. On May 12, 1981, the same day that Ashcraft first wrote to NRC, Dr. Eugene Jacobson, Associate Dean, sent a memorandum to Dr. Stanley Troup, Senior Vice President of the University and Director of the Medical Center, in which Dr. Jacobson suggested that an investigation into Ashcraft's allegations by an outside expert and an investigation of Ashcraft's performance as an employee be conducted simultaneously. Dr. Henry Winkler, President of the University, directed Dr. Troup to arrange for both investigations. The independent investigation of the radiation safety program was conducted between August and October of 1981 by the Ohio Public Health Council, which concluded that the University's "program is adequate" but that "there are areas of the radiation protection program in which improvements are recommended." The evaluation of Ashcraft was prepared by supervisor Fritz in September 1981 but apparently covered Ashcraft's work from January 1981. Ashcraft's overall performance in quality and quantity of work was rated as "low satisfactory," a drop from his prior evaluation in January of 1980 which had rated his performance as "high satisfactory." Ashcraft refused to sign this evaluation. In December 1981, Ashcraft wrote to the head of the State University Board of Regents complaining about the university's

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administrative efficiency and failures in the practice of radiation safety.

In January 1982, Ashcraft's performance was again evaluated by supervisor Fritz. This time Ashcraft's overall performance was rated as "low, needs improvement". Supervisor Fritz commented on the rating form that Ashcraft ". . . must be constantly reminded to keep radiation survey meters in calibration at 6 months intervals . . .," that he ". . . has periods of unexplained absences of about 1/2-1 hour duration - others must frequently hand out packages in his absence . . .," and that he has made unfounded public accusations, derogatory statements, and letters pertaining to the Radiation Safety Office". Ashcraft complained in writing to Dr. Saenger about the statement that he had made unfounded public accusations; his letter of complaint, however, does not mention supervisor Fritz' comments on Ashcraft's failure to calibrate the survey meters or on Ashcraft's unexplained absences.

Two months later, as a result of a request by Dr. Craig Williams, Assistant Professor of Clinical Radiology attached to the University's Radiosotope Laboratory and a member of the Radiation Safety Committee, supervisor Fritz established a specific procedure which Ashcraft was to follow in notifying users of radioactive materials as to the availability of their materials for pick up. This procedure, which was communicated to Ashcraft by memorandum under date of March 29, 1982, called for a second notification to be given end users and for supervisor Fritz or his deputy to be notified if certain packages were not picked up within certain specified periods of time. Ashcraft wrote "Ain't that some BS ?" on this memorandum, and posted it on the wall behind his laboratory door so that, he testified, he could frequently refer to its requirements. Ashcraft did not follow the

instructions in the memorandum to the letter. He testified that he felt that the intent of the memorandum was to ensure that end users of the radioactive materials hadn't forgotten to pick up their packages, and, therefore, he did not apply the procedures where an end user asked him to store packages for a period of time. On May 5, 1982, Ashcraft was reminded by supervisor Fritz to follow the procedures established in March. One copy of this memorandum bears, in Ashcraft's handwriting, the words "Tsk!" "Oh my God!" and "Oh diddle!" Nevertheless, for the next month or two, Ashcraft submitted the reports to Fritz.

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Also on May 5, 1982, Ashcraft wrote a "To whom It May concern" memorandum complaining about specific safety violations and suggesting that the University ". . . invoke an effective radiation safety function." Although it is unclear which University officials received this memorandum, the specific radiation incidents referred to therein were responded to by Professor Williams. Moreover, on May 5th, President Winkler instructed Dr. Robert Daniel, Dean of the College of Medicine, that, ". . . if it has not been done already, it is about time that Mr. Ashcraft be evaluated himself. Even though he can write to whomever he chooses, he does not have the right to undermine a program that has been judged to function adequately."

On August 12, 1981, Ashcraft again wrote to NRC. On October 6, 1982, Ashcraft received a "Notice of Official Reprimand" from supervisor Fritz. The notice cited Ashcraft's failure to follow the instructions set forth in the March 29th memorandum, to the fact that Ashcraft had informed the secretary of the Radiation Safety Office that he would not be able to do any filing for two weeks, and to the fact that Ashcraft became abusive after being admonished by Fritz ". . . to get busy on the filing." Ashcraft responded in writing to the charges in the reprimand notice, giving explanations for the conduct referred to, apologizing for the verbal abuse, and stating that he would, in the future, provide a written status report on packages. Subsequently, Ashcraft met with William Lodge, Associate Director of Labor and Employee Relations, and discussed with him the problems as he, Ashcraft, saw them, including the dangers from excessive exposure to radiation. During this conversation, Ashcraft advised Lodge that he was going to appear on a local radio program and refer to the University's radiation program. Lodge apparently did not try to discourage this appearance, and simply cautioned Ashcraft to say only what was true. (The record indicates that Ashcraft did subsequently, in late 1982 or early 1983, appear on the program.)

At the end of October 1982, Ashcraft again wrote to NRC. In this letter, Ashcraft stated that he had heard that NRC personnel were visiting the University of Cincinnati in January, and reiterated his complaints concerning Dr. Saenger and supervisor Fritz. Ashcraft also related specific instances of unsafe handling of radioactive materials at the University. As a result of this complaint, NRC decided to broaden its investigation

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of the University's handling of radioactive material. According to testimony at the hearing, the NRC's initial decision to conduct an investigation of the Radiation Safety Office had been made as a result of having been advised by supervisor Fritz of a particular incident of possible overexposure which had occurred. Although Ashcraft's complaints did not initiate the NRC investigation, they did dictate its ultimate scope. The NRC investigation was conducted in early 1983, and Ashcraft gave a statement to NRC investigators.

On January 18, 1983, Dr. Saenger recommended to Ms. Billie Willets, Director of Employee and Labor Relations, that Ashcraft should be discharged because:

> Mr. Ashcraft seems unable to determine whether he is developing policy or carrying out specific duties assigned to him by his superiors. As I pointed out in an earlier letter to Dr. Stanley Troup he did not, as evidenced by his previous correspondence, see fit to notify his superiors of what he determined to be apparent breaches of radiation safety within the University and this approach to his work has continued.

Other reasons for the recommended dismissal, Dr. Saenger stated, were the minimal effort by Ashcraft in performing his work, and the fact that he charged Dr. Saenger with a conflict of interest.

Two weeks later, on February 18, 1983, Ashcraft was notified that a disciplinary hearing would be held on February 23rd. The notice charged Ashcraft with failing on 16 occasions, between October 1982 and February 1983, to inform supervisor Fritz of radioactive materials not picked up by the end users within the time limits specified in the March 29, 1982, memorandum. It also charged Ashcraft with having delayed on February 4, 1983, to do a wipe test on a 99m T-C generator. This latter charge was based on a written complaint by Dr. Williams to the effect that the wipe test was not completed until 9:04 a.m. that morning, and that, as a result, drugs for patients in the radiosotope laboratory could not be prepared on time. As a result of the disciplinary hearing, Ashcraft was suspended on February 24, 1983, for five days.

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Before proceeding to the merits of the case, I must decide Ashcraft's request that I consider the August 30, 1983, *NRC Notice of Violation* letter and appendix which, Ashcraft contends, ". . . found the management audit system [of the University] inadequate . . ." and found ". . . that six of the complainant's allegations could lead to violations, personnel exposure to radiation, or other consequences, unless conditions are improved." Complainant's Memorandum to Secretary of Labor, p. 6. I deny complainant's request. That NRC did or did not find that the University violated NRC radiation safety regulations is immaterial to the determination before me of whether the University's

suspension of Ashcraft contravened Section 5851 of ERA. This conclusion emerges from the text of Section 5851 (a)(1)-(3) wherein are set forth the activities which are protected.[2] There is an absence in these paragraphs of any language suggesting that an activity is protected only if it is established that the employer has violated radiation safety requirements. Indeed, the text indicates the contrary by providing protection to a complainant when he is "about to" take action; - i.e., about to report a violation, about to testify, etc., although he has not yet done so. Further, I have already ruled that employees who report safety problems only to their employers and not to NRC are engaged in activities covered by Section 5851, *Mackowiak v. University Nuclear Systems, Inc.*, 82-ERA-8, April 29, 1983, p. 10; and this ruling has been affirmed by the Court of Appeals for the Ninth Circuit, 735 F.2d 1159 (1984). In such cases there is, of course, no possibility of the issuance of a notice of violation as the result of the employee's action. Since complainants are protected from the earliest stage in which they are engaged in the protected activity, it matters not, in determining whether the adverse action against the complainant was taken because of the protected activity, that the end result of the activity was or was not an NRC notice of violation.[3] For that reason I have denied complainant's motion that I consider this document.

Essential to a violation of Section 5851 is that complainant engage in a protected activity and that employer be aware of this. It is clear that this was the case. As noted by the Administrative Law Judge, the respondent University concedes both that Ashcraft's correspondence with NRC is a protected activity and that the University was aware of such correspondence. (D & O., p. 9).[4] The issues then before me

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are whether Ashcraft's suspension was in retaliation for his complaints to NRC, and, if so, whether Ashcraft would have been suspended if he had not complained about safety violations.

From the evidence of record, it is clear that this is a "dual motive" case, that is, that there were two possible motives for claimant's suspension, one a legitimate management reason and the other the impermissible motive of retaliation for a protected activity. The Administrative Law Judge and the parties agreed that the applicable burden of proof standards in "dual motive" cases arising under ERA are those standards which were adopted by the National Labor Relations Board (NLRB) in *Wright Line, a Division of Wright Line, Inc*, 1980 CCH NLRB #17,356 (1980), affirmed *sub. nom*. *NLRB v. Wright Line*, 662 F. 2d 889 (1st Cir. 1981), *cert.den.* 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 103 S. Ct 2469 (1983). The *Wright Line* standards have been made applicable to proceedings arising under Section 5851 of ERA. *Consolidated Edison Company of New York, Inc. v. Donovan*, 673 F. 2d 61 (2d Cir. 1982).[5]

The *Wright Line* test puts upon the employee the initial burden of proving by a preponderance of the evidence that the adverse action taken against the employee was the

result, at least in part, of a protected activity. The burden then shifts to the employer to show by a preponderance of the evidence that the discharge or other adverse action would have occurred in any event, regardless of the forbidden motivation.

The ALJ applied the *Wright Line* standards and concluded that Ashcraft had met his initial burden of showing that has suspension by the University ". . . was due at least in part to his having engaged in protected activities *vis-a-vis* the NRC." (D & O., p. 9). This conclusion is supported by the record evidence. Since, before me, the University does not challenge this finding, there is no need to review the supportive evidence. Accordingly, I adopt the recommendation of the (ALJ) and find that Ashcraft has established that his suspension was due in part to his having engaged in a protected activity.

Ashcraft having met his burden of proof, the question

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becomes whether the University has shown by a preponderance of the evidence that it would have suspended Ashcraft even if he had not communicated with NRC. The University contends that it suspended Ashcraft because he was incompetent and inefficient. As pointed out earlier, the charge of incompetency and inefficiency was based on two separate grounds- 1) that Ashcraft failed, on sixteen occasions, between October 1982 and February 1983, to inform his supervisor on the status of packages as required by the memorandum of March 29, 1982, and 2) on February 4, 1983, Ashcraft had delayed wipe testing a 99M T-C generator and, consequently, delayed its delivery to the radiosotope laboratory, causing the patient schedule to be delayed. Ashcraft contends that his suspension was retaliation for his complaints to University officials and to NRC about radiation safety problems.

The ALJ first looked at the validity of the reasons for the suspension. He found that one reason for the suspension actually existed; - namely, the refusal of the complainant to follow the reporting requirements of the march 29, 1982, memorandum. He, therefore, concluded that the University's action in this regard was not pretextual. The charge of failing to wipe test the generator, the Administrative Law Judge found, was not substantiated by the record evidence but, inasmuch as the University believed that it had occurred and relied on it, was not pretextual.

I agree with the ALJ that the suspension of Ashcraft for failure to follow the instructions of March 29, 1982, was not pretextual. By his own admission, Ashcraft did not, between the period of October 1982 and February 1983, inform supervisor Fritz about packages which had not been picked up within the specified time limits if the end user had arranged for a later pick up date. Although there is testimony from Deputy Radiation Safety Officer Carla Chifos to the effect that the University was out to get something on Ashcraft, and there is testimony from supervisor Fritz that he never attempted to determine whether Ashcraft had, as permitted by the instructions, notified his (Fritz's) deputy, this does not negate the fact that Ashcraft admittedly did not follow

the instructions given him. The discipline of an employee who does not carry out the directions of his employer is of legitimate interest to management.

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I also agree that the charge of not timely wipe testing the generator was not pretextual. This charge was found not to be substantiated in view of record evidence to the effect that there was no established time of day by which the generator had to be ready, and that, on that particular day, no one had requested that it be made available at an earlier time. The charge, however, was based on a written complaint by Dr. Williams sent to supervisor Fritz four months earlier. While better personnel practice might require a thorough investigation by University personnel officials before adding the charge to the disciplinary notice, the absence of such an investigation does not make the inclusion of the charge for purposes of the disciplinary hearing pretextual. This is particularly so since the University gave what is a reasonable explanation for its inclusion; i.e., that civil service rules require that all known offenses be included in a disciplinary notice or be waived. Nor can I find that basing the suspension in part on this charge was pretextual. Although the hearing record before me does not substantiate the charge, there is not sufficient evidence reflecting the contents of the disciplinary hearing record on this point for me to conclude that the basing of the suspension on this charge was pretextual.[6]

Accordingly, I accept the ALJ's finding that employer's stated reasons were not pretextual, and I conclude that employer had a legitimate management interest in disciplining Ashcraft.

That the University had a legitimate business interest in taking adverse action against Ashcraft does not determine the outcome in this case. It merely establishes that this is a "dual motive" case. It must, therefore, be determined whether the University's action was motivated by its legitimate business interest or because of Ashcraft's protected activity. As NLRB stated in *Wright Line*, *supra*: "This existence of both a 'good' and a 'bad' reason for the employer's action requires further inquiry into the role played by each motive."

The ALJ stated that he was ". . . persuaded by a preponderance of the evidence in this case that even if the Complainant had never written to NRC, had never cooperated with the NRC and had never made one statement alleging unsafe practices by the Respondent, he would nevertheless have been disciplined, given his continued verbal attacks on management and his admitted refusal to follow reasonable directives clearly within the scope of his assigned duties." (D & O. p.12.) The ALJ failed

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to point to the evidence he has relied on for this conclusion. The record evidence, however, supports the ALJ's conclusion that the University would have suspended Ashcraft even if he hadn't complained about radiation safety problems.

There is no question that the procedures, which were outlined in the March 29, 1982, memorandum for notifying end users that their packages were ready for pick up and for notifying supervisor Fritz when packages were not picked up on time, were reasonable and served a valid management objective. The radioactive contents of the packages were perishable, and delay in their delivery could destroy the effectiveness of the research project for which they were needed. Ashcraft's refusal to apply these procedures to end users who asked him to store packages for a period of time was based on his conclusion that the intent of the notification requirements had been met. Ashcraft, however, did not inquire of supervisor Fritz whether this indeed was the case. When and to whom the procedures should or should not apply was not a matter within the area of Ashcraft's responsibility. Ashcraft's duty was to carry out management's instructions to him. When he did so intermittently, University officials were not required to let the situation continue and take no action to compel Ashcraft's compliance. Where the employer has a legitimate management reason for taking adverse action against the employee, the employer is not required to hold off such action simply because the employee is engaged in a protected activity. *See, Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), *Peavey v. NLRB*, 648 F. 2d 460 (1981); *Atchison v. Brown and Root*, 82 ERA-9 June 10, 1983; *Hochstadt v. Worcester Foundation Experimental Biology*, 545 F. 2d 2221 (1st Cir. 1976); *Jeffries v. Harris County Community Action Association* 615 F. 2d 102 (5th Cir. 1980); *NLRB v. Kiawah Island, Co. Ltd*, 650 F. 2d 485 (4th Cir. 1981).

The fact that the University did not act precipatively is further indication that it was motivated by Ashcraft's refusal to perform his duties. Disciplinary action was not instituted until almost 11 months after the new notification procedures were established. Ashcraft was given every opportunity to comply with his supervisor's instructions. He was reminded in writing in May 1982 of the necessity of complying with the March instructions and reminded again the following October when he was issued a Notice of Official Reprimand.

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That notice warned Ashcraft that ". . . additional appropriate action. would be taken if his unsatisfactory conduct continued. It was not until January of 1983 that Ashcraft was notified that disciplinary action would be taken against him. Thus, although he had every opportunity to do otherwise, he chose on numerous occasions and for a substantial portion of the period between March of 1982 and January 1983 to ignore the directives of his supervisor.

Moreover, it is particularly significant in determining the motivation for the suspension of Ashcraft that the hearing was restricted to the charges detailed in the notice of hearing. Uncontradicted testimony reveals that, at the start of the disciplinary hearing, the Hearing officer announced that he was not going to take into consideration any of Ashcraft's letter writing activities, and that the scope of the hearing indeed was limited to Ashcraft's incompetency and inefficiency. In view of this, it appears that the decision to suspend Ashcraft was based solely on the charges detailed in the hearing notice, and that the

decision to suspend was made free of any impact from Ashcraft's complaints about radiation safety.

Furthermore, I find that any deviation from the technical requirements of the University's disciplinary procedures is not an indication of an unlawful motivation for Ashcraft's suspension. Although Fritz failed to observe each step of the counseling requirements, he did issue a written reminder to Ashcraft prior to issuing the written reprimand. Ashcraft does not contend that he did not understand the instructions in the March 1982 memorandum or that he never received these instructions. Nor do I find that imposition of a five day suspension rather than a three day suspension is sufficient to attribute an illegal motive for the suspension. As noted by the ALJ, William Lodge, Assistant Director of Employee and Labor Relations, testified that, whether a three-day or a five-day suspension were given, was a matter of discretion. This testimony was uncontroverted.

Accordingly, on the basis of the circumstances surrounding the discipline of Ashcraft, I agree with the ALJ that the University would have suspended Ashcraft even if he had not engaged in protected conduct. I, therefore, accept the ALJ's recommendation that Ashcraft's complaint be dismissed.

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Therefore, it is ordered that the complaint of Irvin Lee Ashcraft be dismissed.

Under Secretary of Labor

Dated: NOV 1 1984
Washington, D.C.

**[ENDNOTES]**

[1] In accordance with the requirements of 29 CFR Part 24, the complaint was first referred to the Wage and Hour Division of the U.S. Department of Labor for investigation and determination. Subsequently, at the employer's request, the case was referred for a *de novo* formal hearing on the record before the Administrative Law Judge.

[2] No employer . . . may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter. . .
> (2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in a manner in such a proceeding . . . .

[3]Moreover, Section 24. 7(b) of 29 CFR Part 24 requires that my final order be based on the record and the recommended decision of the Administrative Law Judge. Since the *NRC Notice of Violation* letter and appendix were not part of the record below, I would be unable to consider it at this time even if it were material.

[4] At the hearing, Ashcraft argued that his unrebutted testimony was that he began to point out safety problems shortly after he went to work for the University, and that, inasmuch as inefficiency impacts on safety, the references in the 1980 letters to mismanagement and the conduct of personal business were actually safety complaints. The Administrative Law Judge simply ruled that the documentary evidence reflected that Ashcraft did not make safety complaints until 1981. On the basis of the facts of this case it is unecessary to decide whether the protected activity began in 1980 or in 1981. It suffices, therefore, that the University has conceded that Ashcraft's communications with NRC beginning in 1981 constitute protected activity.

[5] The Sixth Circuit, in which this case arises, has recognized in a retaliatory adverse action case under Section 5851 that NLRB standards allocating burdens of proof should apply. *De Ford v. Secretary of Labor and Tennessee Valley Authority*, 700 F. 2d 281, 285 (6th Cir. 1983).

[6]Cyril Kupferberg, the hearing officer, testified that it was established at the disciplinary hearing that the generator was supposed to be wipe tested and moved out expeditously early in the morning, and that the need for this expeditious handling had been communicated to Ashcraft; however, he did not recall that the generator had been delivered shortly after nine a.m. on February 4, 1983.